

MEMORANDUM OF LAW

DATE: March 6, 1990

TO: Councilmember Ron Roberts

FROM: C. M. Fitzpatrick, Assistant City Attorney

SUBJECT: Utility Users Tax

By a memorandum dated March 5, 1990, you have requested the City Attorney's opinion concerning the legality of imposing a utility users' tax on the City's "Water Utilities Department" if the revenues derived from the tax are not deposited in an "Enterprise Fund" relating to water or sewer service.

In our view, the imposition by the City of a utility users' tax on utility services such as water delivery and sewer service provided by the City's Water Utilities Department is not prohibited even if the revenues derived from the tax are not deposited in either the Water Revenue or the Sewer Revenue Fund.

As of now, the substantive provisions of the utility users' tax have not been formulated. However, such a tax is typically a tax on the user of the commodity (water, gas, sewer service, electricity, cable, or telephone) and collected from the user by the supplier on behalf of the city. *Rivera v. City of Fresno*, 6 Cal.3d 132, 135 (1971). Hence the tax is not a diversion of funds from the service provider. Rather, it is a tax on the user of the utility generally expressed as a percentage of the total charges and imposed as a means of raising general revenue. (See San Diego City Attorney Opinion No. 74-14, October 29, 1974; San Diego City Attorney Memorandum of Law, May 2, 1989, copies attached.)

From our point of view, the City's use of the fiscal term and device "Enterprise Fund" has very little legal significance. It is by and large an accounting device which may have some slight legal significance under Article XIII B of the California Constitution (Gann Limit).

However, San Diego City Charter Section 53 requires that revenues derived from the sale of water by the City be placed in

a special fund to be used solely for water delivery, etc., purposes. In a like manner, provisions of the San Diego Municipal Code require that revenues derived from the provision of sewer service be placed in a special fund to be utilized solely for operation, maintenance and capital improvements of the sewerage works owned by the City.

Legislation imposing a tax on those utility services (among

others) is a separate legislative act and decision. It is authorized by the City Council's general powers to enact revenue raising measures unless specifically precluded by the Charter or applicable state or federal law, or constitutional principles.

In this case, there are no prohibitions of which we are aware.

JOHN W. WITT, City Attorney

By

C. M. Fitzpatrick

Assistant City Attorney

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Attachments

ML-90-35